

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :
 :
 v. : NO. 1334-CR-2015
 :
 ZACHARY A. KONNECKE, :
 :
 Defendant :
 :

Cynthia Ann Dyrda Hatton, Esquire Counsel for the Commonwealth
Asst. District Attorney

Brian J. Collins, Esquire Counsel for the Defendant

MEMORANDUM OPINION

Serfass, J. - June 29, 2017

On May 9, 2015, Defendant, Zachary Konnecke, (hereinafter "Defendant") was stopped at a regulatory checkpoint where he was arrested and ultimately charged with the following offenses:

1. DUI: Controlled Substance - Schedule 1 - 1st Offense,
75 Pa. C.S.A. §3802(D)(1)(i);
2. DUI: Controlled Substance - Impaired Ability - 1st Offense,
75 Pa. C.S.A. §3802(D)(2);
3. Careless Driving, 75 Pa. C.S.A. §3714(a); and
4. Failure to Use Safety Belt - Driver and Vehicle Occupant,
75 Pa. C.S.A. §4581(a)(2).

Defendant's "Omnibus Pre-Trial Motions" were filed on April 28, 2016, challenging the constitutionality of the checkpoint, moving to suppress all evidence gained as a result thereof as fruit

of a poisonous tree, and seeking dismissal of the DUI-related charges¹. A hearing on the aforesaid motions was held before the undersigned and post-hearing briefs were filed by counsel at the direction of the Court. For the reasons set forth hereinafter, Defendant's omnibus pre-trial motions will be granted.

FACTUAL AND PROCEDURAL HISTORY

On May 9, 2015, Defendant was travelling on Maury Road, south of the intersection with State Route 903, in Penn Forest Township, where he encountered a regulatory checkpoint. Pennsylvania State Police Trooper Matthew Borger approached Defendant's vehicle and, as Defendant lowered his window, the trooper immediately detected the odor of marijuana emanating from inside the vehicle. Trooper Borger asked Defendant for his driver's license, registration, and proof of financial responsibility. After the trooper smelled marijuana on Defendant's breath, Defendant was asked to pull over to the side of the road where Trooper Borger conducted a series of field sobriety tests. During these tests, the trooper noticed several signs of impairment and Defendant was taken to Gnaden Huetten Memorial Hospital for a blood draw. Upon arrival, Defendant was read the DL-26 form and refused to consent to a blood draw. He was ultimately released to friends at the hospital.

¹ In addition to challenging the constitutionality of the regulatory checkpoint, we note that Defendant has also challenged the two roadside field sobriety tests administered by Trooper Borger as well as Defendant's un-Mirandized statements to the trooper.

On April 28, 2016, Defendant filed the instant omnibus pre-trial motions seeking to suppress the evidence obtained as a result of what is alleged to be an unconstitutional traffic stop, and to quash counts one and two of the information related to driving under the influence of a controlled substance.

Accordingly, a hearing was held before this Court during which Corporal Borosh supplied reports from earlier checkpoints which detailed the citations that were previously issued during those checkpoints, as well as lists of DUI and non-DUI vehicle code citations along with the time and place of each incident. However, Corporal Borosh could not state with certainty that these were the same statistics used by Corporal Shawn Noonan when he was determining the time, location, and duration of the checkpoint at issue.

At the same hearing, Corporal Noonan testified that he gathered the requisite data in preparation for the checkpoint and was the supervising officer at the checkpoint on September 4, 2015. In preparing this checkpoint, Corporal Noonan analyzed a PennDOT automobile accident reporting website, data reflecting when and where individuals were cited for motor vehicle code violations and DUI arrest records. He also discussed an appropriate location for the checkpoint with Corporal Borosh. However, Corporal Noonan did not supply the Commonwealth or this Court with any of the statistics he used in determining the time and location of this

particular checkpoint. When asked why he chose the Maury Road location for the checkpoint, Corporal Noonan testified that he was familiar with the area based on previous stops he had made and reasoned that the weekend would be the best time for the checkpoint due to the natural increase in traffic.

Subsequently, counsel for Defendant and counsel for the Commonwealth filed briefs in support of their arguments. Based upon the testimony elicited at the hearing, the oral argument of counsel and the briefs of the parties, we are confronted with two issues:

1. Whether the regulatory checkpoint at issue complied with the standards established by the United States and Pennsylvania constitutions; and
2. If the regulatory checkpoint was not constitutionally sound, whether the Commonwealth presented sufficient evidence at the preliminary hearing to establish a *prima facie* case for violation of 75 Pa. C.S.A. §3802(d)(2).

DISCUSSION

As an initial matter, count one, DUI: Controlled Substance - Schedule 1 - 1st Offense, will be dismissed because Defendant refused to submit to a blood draw. Due to the lack of blood evidence, the Commonwealth does not have proof that there was a schedule 1 controlled substance in Defendant's bloodstream on

September 4, 2015. Additionally, we note that the parties are in agreement that this count should be dismissed.

Turning to the constitutionality of the regulatory checkpoint at issue, the Commonwealth bears the burden of proving that the challenged evidence was not obtained in violation of the accused's rights. Pa.R.Crim.P. 581(H). Both the Fourth Amendment of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution prohibit unreasonable searches and seizures. It is a well settled principle of law that stopping an automobile in this Commonwealth is a detention of the occupants and is a seizure subject to constitutional restraints. See Commonwealth v. Blouse, 611 A.2d 1177, 1178 (Pa. Cmwlth. 1992); and Commonwealth v. Tarbert, 535 A.2d 1035, 1037 (Pa. Cmwlth. 1987).

Generally, law enforcement must have reasonable suspicion or probable cause that a violation of the vehicle code has occurred to effectuate an investigatory stop. However, Pennsylvania's Vehicle Code (75 Pa.C.S.A. §6308 et. seq.) authorizes police officers to stop vehicles and conduct systematic DUI checkpoints or traffic safety checkpoints established to detect license, registration and equipment violations, even though such stops are not based on reasonable suspicion or probable cause standards. See 75 Pa.C.S.A. §6308

(b). The applicable section of the Vehicle Code provides as follows:

§6308. Investigation by police officers

* * * *

(b) **Authority of police officer.**--Whenever a police officer is engaged in a systematic program of checking vehicles or drivers or has reasonable suspicion that a violation of this title is occurring or has occurred, he may stop a vehicle, upon request or signal, for the purpose of checking the vehicle's registration, proof of financial responsibility, vehicle identification number or engine number or the driver's license, or to secure such other information as the officer may reasonably believe to be necessary to enforce the provisions of this title.

Id.

To protect individuals "from arbitrary invasions at the unfettered discretion of the officers in the field" roadblocks must be "conducted in accordance with specific enumerated guidelines, eliminating the discretion that is problematic in random traffic stops." Commonwealth v. Blouse, 611 A.2d at 1178-79. In Tarbert and Blouse, the Pennsylvania Supreme Court established the following criteria which must be met to establish a constitutional regulatory checkpoint:

(1) vehicle stops must be brief and must not entail a physical search; (2) there must be sufficient warning of the existence of the checkpoint; (3) the decision to conduct a checkpoint, as well as the decisions as to time and place for the checkpoint, must be subject to prior administrative approval; (4) the choice of time and place for the checkpoint must be based on local

experience as to where and when intoxicated drivers are likely to be traveling; and (5) the decision as to which vehicles to stop at the checkpoint must be established by administratively pre-fixed, objective standards, and must not be left to the unfettered discretion of the officers at the scene.

Commonwealth v. Worthy, 957 A.2d 720, 725 (Pa. Cmwlth. 2008) citing Blouse, surpa, and Tarbert, surpa. Regulatory checkpoints must also conform to these criteria and if they fail to do so, then evidence derived from that checkpoint, including the results of field sobriety testing, must be suppressed. Id².

Viewing the checkpoint at issue in light of these criteria raises two concerns regarding the constitutional validity of the checkpoint. The second criteria requires that motorists be given advance warning of the checkpoint looming ahead of them. In Blouse, our Supreme Court explained that, "to avoid unnecessary surprise to motorists, the existence of a roadblock can be so conducted as to be ascertainable from a reasonable distance or otherwise made knowable in advance." Blouse, 611 A.2d at 1180. Despite this low standard, the only testimony provided concerning advance warning was Corporal Noonan's testimony that signs were placed a certain distance from the center of the checkpoint. Since we have no other testimony or evidence concerning advanced warning, we do not know what message the signs displayed, or how far away from the

² In situations involving a regulatory safety checkpoint, the fourth guideline is adjusted to identify locations, dates and times where license, equipment and inspection violations are likely to occur.

checkpoint they were placed. Based on the sheer lack of testimonial evidence, we cannot state with certainty that Defendant was provided sufficient advance warning of the impending checkpoint.

The greater concern with the checkpoint at issue relates to how the time, location, and duration of the checkpoint were established. Corporal Noonan testified that in making this determination, he spoke with Corporal Borosh because he had more experience with conducting non-DUI regulatory checkpoints. Corporal Noonan did not provide the Commonwealth, or this Court, with any datasets or statistics used in determining an appropriate time and location for this checkpoint. Conversely, Corporal Borosh did provide this Court with several sets of statistics concerning automobile accidents, citations, and complaints made in the area surrounding the checkpoint at issue. However, Corporal Borosh could not say with certainty that these statistics were the same ones used by Corporal Noonan when he made his decision as to when and where this checkpoint would occur.

The Commonwealth argues that the data Corporal Borosh provided this Court was identical to the data Corporal Noonan relied upon in making his determination because each trooper had access to the same databases where these statistics were stored. We find this argument unconvincing for two reasons. First, neither trooper testified that the statistics admitted into evidence were the statistics considered by Corporal Noonan in determining when

and where to establish this checkpoint. Second, Corporal Noonan testified that the statistics he usually uses are different from those used by Corporal Borosh. Even though the troopers use the same databases, Corporal Noonan tends to look at DUI statistics, whereas Corporal Borosh tends to use statistics related to other issues concerning driver's licenses, proper registration, and mechanical defects. Additionally, Corporal Noonan did not testify that he collected data any differently for the checkpoint at issue than the way he normally would. For these reasons, the Commonwealth's contention that because the troopers had access to the same data, they used the same data, is not compelling and we are left with insufficient statistical data to support Corporal Noonan's decision to establish this checkpoint when and where it was initiated.

Since we do not have the local statistical data used by Corporal Noonan to choose the time and place of this checkpoint, we must rely on his testimony to determine the constitutional validity of the checkpoint. The Pennsylvania Superior Court has determined that general testimony which does not include specific statistics regarding accidents, arrests, citations, etc., and provides no insight into the selection of the time, place, and duration of the checkpoint does not satisfy the criteria outlined in Tarbert and Blouse. Commonwealth v. Garibay, 106 A.3d 136, 142 (Pa. Super. 2014). Without the statistical data provided by

Corporal Borosh, we are left with the general testimony of each trooper. Even though Corporal Noonan testified that in preparing this checkpoint he analyzed data from internal and external databases which track traffic accidents, and an internal database which tracks when and where citations were issued, he did not identify any specific data to support the time, location, and duration chosen for this checkpoint. Moreover, there was no testimony as to why Saturday evening at approximately 7:40 p.m. was most likely to lead to arrests for license, registration, insurance or mechanical violations. (We note that neither trooper testified as to the exact times the checkpoint was conducted on May 9, 2015.) Therefore, we find the Commonwealth's evidence to be conclusory in nature. The general testimony of Corporal Noonan, which was uncorroborated by relevant statistical data, is insufficient to meet the criteria outlined in Tarbert and Blouse.

Therefore, the Commonwealth has failed to prove that the subject checkpoint was constitutionally valid because there is no evidence that adequate advance warning was provided to motorists approaching the checkpoint and, more importantly, the Commonwealth failed to prove that the time, place, and duration of the checkpoint was supported by significant statistical data based on accidents, arrests, and citations in the local area. As a result of the Commonwealth's failure to meet its burden of proof under Tarbert/Blouse, Defendant's motion to suppress the evidence

obtained against him as a result of the regulatory checkpoint will be granted and all such evidence will be suppressed as having been obtained pursuant to an unconstitutional stop³.

CONCLUSION

For the foregoing reasons, Defendant's "Omnibus Pre-Trial Motions" will be granted and we will enter the following

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³ Because this Court has determined that the regulatory checkpoint was constitutionally invalid and that all evidence derived therefrom must be suppressed, we need not address the merits of Defendant's arguments regarding the propriety of the field sobriety tests administered nor the un-Mirandized statements.

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ORDER OF COURT

AND NOW, to wit, this 29th day of June, 2017, upon
consideration of Defendant's "Omnibus Pre-Trial Motions", the
hearing held thereon, the oral argument of counsel, and review
of the parties' post-hearing briefs, and for the reasons set
forth in our Memorandum Opinion bearing even date herewith, it
is hereby

ORDERED and DECREED that Defendant's "Omnibus Pre-Trial
Motions" are GRANTED and that all incriminating information
gained from the traffic stop at issue is SUPPRESSED.

BY THE COURT:


Steven R. Serfass, J.

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